89-447

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

EVELYN PENCE

Petitioner

vs.

BOARD OF COUNTY COMMISSIONERS,
OF HAMILTON COUNTY, OHIO, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE FIRST APPELLATE DISTRICT OF OHIO

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57pp

QUESTION PRESENTED FOR REVIEW

May the Due Process claims of a murdered prison guard, brought under 42 U.S.C. § 1983 against a County government and its officials, be dismissed by a state court via summary judgment on the ground that the facts showed only a "lack of due care", when the record contained substantial, uncontradicted evidence not only that the County was deliberately indifferent to dangerous and substandard prison conditions, but that the County actually enforced a policy and custom of providing metal materials to violent inmates, with full knowledge that inmates would convert the metal into deadly weapons and that injury or death to prison inmates or guards was substantially certain to occur?

PARTIES

PETITIONER (PLAINTIFF/APPELLANT in the First Appellate District of Ohio)

Evelyn Pence, as Personal Representative and Administratrix of the Estate of Philip J. Pence, deceased.

RESPONDENTS (DEFENDANTS/APPELLEES in the First Appellate District of Ohio)

1) Board of County Commissioners of Hamilton County, Ohio
2) Hamilton County, Ohio
3) Lincoln J. Stokes, Sheriff of Hamilton County, Ohio
4) Victor Carelli, Chief Deputy Sheriff of Hamilton County, Ohio
5) Michael Montgomery, Director of Corrections, Community Correctional Institute
6) William A. Withworth, Superintendent, Community Correctional Institution
7) Stanley Grothaus, Department Superintendent, Community Correctional Institution
8) Robert Brockemeyer, Chief of Security, Community Correctional Institution
9) James York, Supervisor, Community Correctional Institution
10) The Cincinnati Insurance Company

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PETITION FOR A WRIT OF CERTIORARI TO THE FIRST APPELLATE DISTRICT OF OHIO

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner Evelyn Pence respectfully prays that a writ of certiorari issue to review the judgment of the First District Court of Appeals of Ohio.

OPINIONS BELOW

The opinion of the First Appellate District of Ohio is unreported and appears in the Appendix hereto, page 2a. The entry of the Supreme Court of Ohio, denying review of the decision of the First Appellate District was unreported and appears in the Appendix hereto, page 1a.

JURISDICTION

The decision of the First Appellate District of Ohio was entered on February 15, 1989. The entry of the Supreme

Court of Ohio denying review of the decision of the First Appellate District was entered on June 7, 1989 and this petition was filed within ninety (90) days of that date. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE, Title 42; Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation or any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia, shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Statement Of The Facts

The Community Correctional Institution ("CCI") is a correctional facility housing violent criminals in Hamilton County, Ohio. Pursuant to a contract with the City of Cincinnati, Hamilton County assumed full ownership, operation and control of CCI in 1981. The Hamilton County Sheriff's Office provided the manpower to guard and manage CCI. Petitioner's decedent, Phillip J. Pence, worked for the Hamilton County Sheriff's Office at CCI as a prison guard until he was violently murdered by a CCI inmate on June 9, 1984. [Hamilton County, its officials and Board of County Commissioners, and the CCI supervisors who are parties to this action will hereinafter be referred to collectively as "Respondents".]

For years prior to June 9, 1984, Respondents had knowledge that dangerous and life-threatening conditions existed at CCI. Sharp metal material was readily available to inmates from two different sources there. One source was old chain-link fencing located throughout the grounds, from which metal material was easily removed by inmates. The other source was metal handles actually provided by Respondents to inmates with buckets for overnight toilet purposes. Metal from both sources was routinely fashioned into sharp lethal weapons ("shanks") by the CCI inmates. This practice was so common that CCI guards would discover as many as four or five shanks per day in the possession of the inmates. In spite of repeated employee complaints about the availability of the deadly weapons to violent criminals, Respondents took no remedial action. Rather, when Respondents discovered buckets without handles, they ordered prison guards to provide additional metal handles to the inmates. Moreover, when guards, in fear for their safety, took the initiative to remove handles from buckets prior to distribution, Respondents ordered replacement of the metal handles. This practice and policy, for which Respondents were solely responsible, continued in spite of Respondents' actual knowledge that inmates would convert the metal into

deadly shanks. In addition to the practices and policy just described, Respondents operated CCI with other significant safety hazards, many of which constituted violations of Ohio law and federal prison guidelines. [See affidavit of expert witness Ken Katsaris, Appendix p. 14a.]

On June 9, 1984, Respondents were warned as early as 4:00 p.m. that inmate William Zuern ("Zuern") may have possessed one of the deadly shanks. However, no search was ordered for Zuern's cell until 10:00 p.m. No written procedures were provided to CCI guards for properly searching a cell, and Phillip Pence was given no specific instructions regarding the search of Zuern's cell on June 9, 1984. Shortly after Pence and another prison guard opened Zuern's cell door, Zuern lunged at Pence and stabbed him in the chest with a metal shank. Pence, who was 26 years old at the time of the stabbing, died within one hour.

B. History of Proceedings and Federal Questions Raised by Petitioner.

On May 30, 1985, Petitioner Evelyn Pence ("Petitioner") filed a Complaint in Hamilton County (Ohio) Court of Common Pleas on her own behalf and as Personal Representative and Administratrix of the Estate of Phillip Pence. Petitioner based her complaint on several state law claims, as well as a claim that Respondents had deprived Phillip Pence of life and liberty without due process of law, in violation of 42 U.S.C. § 1983. Petitioner specifically alleged a breach of duty in her complaint. Respondents filed a joint Motion for Summary Judgment in October 1986, which was granted by the Trial Court on January 29, 1988. The Trial Court found that the Respondents were immune from liability on the state law claims under the Worker's Compensation laws in Ohio. The Trial Court's short opinion failed to address Petitioner's federal § 1983 claims. (Appendix, page 11a.)

On February 1, 1988, Petitioner appealed the Trial Court's judgment to the First Appellate District (Hamilton County) of Ohio. Petitioner stated her Fourth Assignment of Error as follows:

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT, IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT ON THE CAUSE OF ACTION EXISTING UNDER 42 U.S.C., § 1983.

After briefing and oral argument, the First Appellate District affirmed the Trial Court's judgment on February 15, 1989, while devoting less than ten lines of its opinion to the dismissal of Petitioner's § 1983 claim. The Court concluded that Summary Judgment in favor of Respondents was proper because their conduct amounted at most to a lack of due care, which does not state a Due Process claim under 42 U.S.C. § 1983. (Appendix, page 7a, 8a)

On April 10, 1989, petitioner filed a Memorandum in Support of Jurisdiction with the Supreme Court of Ohio, seeking review of both the state law claims and the federal § 1983 claim. Petitioner stated the following proposition of law for consideration by the Supreme Court of Ohio:

PROPOSITION OF LAW NO. 4:

WHEN COUNTY OFFICIALS KNOWINGLY ESTABLISH OR DISREGARD POLICIES AND CUSTOMS WHICH CREATE AN UNSAFE WORK ENVIRONMENT FOR PRISON GUARDS IN A COUNTY CORRECTIONAL FACILITY AND WHICH REFLECT EITHER GROSS NEGLIGENCE, RECKLESSNESS, OR DELIBERATE INDIFFERENCE TO THE SAFETY OF THE PRISON GUARDS, A PRISON GUARDS'S DEATH RESULTING FROM THAT UNSAFE ENVIRONMENT GIVES RISE TO A SUBSTANTIVE DUE PROCESS VIOLATION ACTIONABLE UNDER 42 U.S.C. § 1983.

After an opposing memorandum was filed by Respondents on May 5, 1989, the Supreme Court of Ohio dismissed Petitioner's appeal on June 7, 1989 for the reason that no substantial constitutional question existed therein. (Appendix, page 1a)

REASONS FOR GRANTING THE WRIT

I. DEFINING THE LIMITS OF SUMMARY JUDGMENT

The question presented for review actually has two components: A procedural question arising from the state court's use of summary judgment, and the substantive question of whether a substantive due process violation has occurred.

From a procedural standpoint, this Court should grant this writ to define the limits which bind state courts in disposing of meritorious federal civil rights claims by summary judgment. Specifically, this case involves a state court's ultimate conclusion that Petitioner failed in her claim under 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment because the evidence supported nothing more than a "lack of due care". By evaluating evidence in this manner, purportedly construed most favorably to Petitioner, the Ohio First District Court of Appeals managed to insulate Respondents from liability when, by any objective standard, Respondents' conduct was sufficiently conscience-shocking and abusive to create a fact issue for trial.

Petitioner is well aware that it is the exception, rather than the rule, for this Court to undertake a review of evidentiary findings. However, when important federal rights are at stake, this Court has historically approached such review as a duty. "[T]his Court will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze facts." *Fiske* v. *Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed.2d 380 (1927). "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the constitution inviolate." *Napue* v. *Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). "When a Federal right has been

specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in expressed terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a Federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the Federal right may be assured." *Norris* v. *Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed.2d 1074 (1935).

Petitioner submits that there is compelling evidence in this record to support the allegations that Respondents breached their duty to Phillip Pence because of conduct rising at least to deliberate indifference and possibly to willful intent to endanger the life of Phillip Pence. In addition to expert Ken Katsaris' opinion that conditions at CCI created a substantial certainty that injury or death would occur, and that the deliberate acceptance of such conditions directly caused the death of Phillip Pence, the record also contains no less than eight corroborative depositions of CCI employees and supervisors, including some of the Respondents herein, which uniformly support Petitioner's factual allegations. Specifically, the depositions document beyond any doubt that material for weapons was readily available and even provided to inmates on a daily basis, that everyone at CCI was aware of this practice and the existence of weapons, that prison guards routinely found shanks and turned them into CCI supervisors, and that Respondents took no steps to eliminate the dangerous conditions created and perpetuated by their own policies and customs.

When this evidence is construed most favorably to Petitioner, there is, by any objective standard, a fact issue as to whether Respondents caused the death of Phillip Pence with their gross negligence, deliberate indifference, or willful intent. Both the Trial Court and the First Appellate District

held that the evidence in this case did not reach the level of intent required to pierce Respondents' immunity under Ohio's Workers' Compensation laws, and that conclusion of state law is not for this Court to review. However, in light of this Court's assertion that "[Section 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions" *Monroe* v. *Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed. 2d 492 (1961), it is instructive to consider relevant language from the area of tort law in deciding whether the Ohio courts acted properly in dismissing Petitioner's federal claims as well:

> "All consequences which the actor desires to bring about are intended. . . . Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."

Restatement of the Law 2d, Torts (1965), Section 8(A), comment b. Petitioner's expert testimony that the conditions at CCI created a substantial certainty of injury or death, along with multiple corroborative depositions to the effect that Respondents were fully aware of these dangers and actively perpetuated them, certainly precludes a dismissal by summary judgment. Should this Court deny this writ and allow the decision of the First District Court of Appeals to stand, it would send a message that state courts can circumvent the clear legislative intent of 42 U.S.C. § 1983 and protect county governments and municipalities from liability by making unsupportable evaluations of factual evidence to summarily dispose of meritorious federal claims. Aside from creating an environment in state courts where civil rights would not be protected, such a decision may create the long range effect of deterring future plaintiffs from bringing valid civil rights claims to the state courts, thereby shifting an even greater burden to the federal courts.

In addressing the proper standard for granting summary judgment, this Court has previously stated that "Where the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is 'no genuine issue for trial' ". *Matsushita Elec. Indus. Co.* v. *Zenith Radio*, 475 U.S. 560, 89 L.Ed. 538, 552 (1986). Certainly a trier of fact would not be deemed irrational if, in this case, he had concluded that Respondents' conduct was shocking and created a genuine issue regarding gross negligence or deliberate indifference. Indeed, it seems irrational not to conclude that Respondents exhibited a deliberate indifference to a known life-threatening risk, which Respondents themselves had created and perpetuated.

II. SUBSTANTIVE DUE PROCESS

A. The Gray Area Between Negligence and Intent.

A second compelling reason for granting this writ is that this Court has never directly addressed the issue of substantive due process violations for conduct which goes beyond mere negligence. The First District Court of Appeals relied on *Davidson* v. *Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) to dismiss Petitioner's claims below. The *Davidson* case clearly established that mere negligence does not trigger the due process clause for purposes of § 1983. However, in *Daniels* v. *Williams*, 474 U.S. 327, 333, 106 S.Ct. 662, 666, n.3, 88 L.Ed. 2d 662 (1986) the Court, in an oft-quoted footnote, specifically declined to consider "whether something less than intentional conduct, such as recklessness or 'gross negligence', is enough to trigger the protections of the Due Process clause." In the absence of this Court's definitive authority, it is widely accepted in the Federal Circuits that varying degrees of conduct in excess of mere negligence is sufficient to create a substantive due process violation: *Nishiyama* v. *Dickson County, Tennessee*, 814 F.2d 277 (6th Cir. 1987) ("gross negligence" found to be a sufficiently arbitrary use of governmental power to trigger a substantive due process violation under the Fourteenth Amendment); *Taylor* v. *Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (allegation of "deliberate indifference" states a constitutional claim for deprivation of liberty interest); *White* v. *Rochford*, 592 F.2d 381 (7th Cir. 1979) ("It is clearly established that [state officials] may be held liable for 'gross negligence' or 'reckless disregard' for the safety of others.")

B. Duty to Protect.

This case also presents an important secondary issue not yet addressed by this Court relative to substantive due process. Specifically, this case presents unique facts for determining exactly when the state owes a duty to protect an individual from the violent acts of a third party. In *Martinez* v. *California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed. 2d 481 (1980), this

Court implied that under special circumstances a duty may be imposed on a state to protect an individual from third party violence. At one end of the spectrum are cases such as *Martinez* and *DeShaney* v. *Winnebago County Dept. of Social Services*, ____ U.S. ____, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), wherein this Court has affirmed that the state generally owes no duty to defend or protect an individual against private violence. At the other end are cases recognizing the duty to protect and care for individuals who are involuntarily confined by the state. *Youngberg* v. *Romeo*, 457 U.S. 307 (1982); *Revere* v. *Massachusetts General Hospital*, 463 U.S. 239 (1983). The facts of this case fall somewhere in between, but case law from two federal circuits strongly suggests that Respondents owed such a duty to Phillip Pence.

Most directly on point is *Nishiyama*, supra, wherein the Sixth Circuit reversed a Rule 12(B)(6) dismissal by the District Court and held that § 1983 liability may be attributable to the State for the violent acts of a prison inmate, where the inmate remained under the control of the state and the state actually provided to the inmate the means (a fully equipped police car) with which to commit the crime. "None of the cases following *Martinez* contains a similarly close relationship between the criminal acts and the defendants' acts under color of law." 814 F.2d at 281. If anything, the facts in this case are even more flagrant that those in *Nishiyama*, as Respondents made a policy of placing weapons into the hands of the inmates on a daily basis, and prohibited the employees from taking protective action.

Somewhat more speculative is the language in *Ellsworth* v. *City of Racine*, 774 F.2d 182 (7th Cir. 1985), wherein the Seventh Circuit focused not on the relationship between the state and the criminal act, but rather on the special relationship between the state and its employees:

> There may be situations when a municipal employee and the municipality have, by virtue of the employment relationship, a special relationship for purposes of § 1983. In that case, the municipality would have a constitutional

> duty to provide elementary protective services to the employee. Thus, we in no way want to immunize municipalities from liability for duties they breach.

While he was not as helplessly confined as prison inmates or others who are involuntarily restrained, Phillip Pence certainly had a more direct relationship with the state than do members of the general public. As a state employee performing a role essential to the administration of criminal justice, yet facing the day-to-day dangers of the prison environment, Phillip Pence had the right to expect his County employer not to actively contribute to his death. The United States Court of Appeals for the First Circuit, for example, has suggested that a special relationship implicates the Fourteenth Amendment "when the state, by exercising custody or control over the plaintiff, effectively strips her of her capacity to defend herself, or affirmatively places her in a position of danger that she would not otherwise have been in." *Estate of Gilmore* v. *Buckley*, 787 F.2d 714, 722 (1st Cir. 1986). There is simply overwhelming evidence in this record to support a finding that Respondents were directly responsible for endangering the life of Phillip Pence, in the context of the employer-employee relationship wherein Respondents controlled and directed Pence's conduct and enforced policies which prohibited him from taking measures to protect himself.

Accordingly, there are two special relationships in this case which independently created a duty on the part of Respondents to protect Phillip Pence: The custodial relationship wherein Respondents failed to control a violent inmate (Zuern) and ultimately assisted him in the killing of Phillip Pence, and the employment relationship between Respondents and Phillip Pence wherein Respondents failed in their duty to provide a safe work environment.

In light of the speculation and uncertainty which is evident in the federal circuits as they grope for the proper standards governing substantive due process violations, and in light of the dubious use of summary judgment by the Ohio court in

this case to insulate Respondents from liability in the aftermath of their conscience-shocking conduct, Petitioner respectfully suggests that federal and state courts alike would greatly benefit from further guidance by this Court regarding these heavily litigated civil rights issues.

CONCLUSION

Based upon the foregoing, a writ of certiorari should issue to review the judgment of the First Appellate District of Ohio.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

THE SUPREME COURT OF OHIO
1989 TERM

Case No. 89-591

EVELYN PENCE, ETC.,

Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY ET AL.,

Appellees.

ENTRY

To wit: June 7, 1989

Upon consideration of the motion for an order directing the Court of Appeals for Hamilton County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Condit & Dressing.
(Court of Appeals No. C880080)

/s/ THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-880080
TRIAL NO. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, deceased,
Plaintiff-Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO,

HAMILTON COUNTY, OHIO,

LINCOLN J. STOKES, SHERIFF OF HAMILTON COUNTY, OHIO,

VICTOR CARRELLI, CHIEF DEPUTY,

MICHAEL MONTGOMERY, DIRECTOR OF CORRECTIONS,

WILLIAM A. WITHWORTH, SUPERINTENDENT,

STANLEY GROTHAUS, DEPARTMENT SUPERINTENDENT,

ROBERT BROCKMEYER, CHIEF OF SECURITY,

JAMES YORK, SUPERVISOR,

and

THE CINCINNATI INSURANCE COMPANY,
Defendants-Appellees,

and

WILLIAM ZUERN, et al.,
Defendants.

DECISION
(Filed February 15, 1989)

Civil Appeal From: Court of Common Pleas

Judgment Appealed From is: Affirmed

Date of Judgment Entry on Appeal: February 15, 1989

Condit & Dressing Co., L.P.A., and John W. Dressing, Esq., 305 Dixie Terminal Building, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Arthur M. Ney, Jr., Prosecuting Attorney, and Robert E. Taylor, Esq., 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Defendants-Appellees.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, stipulations as to a contract and several depositions, journal entries and original papers from the Hamilton County Common Pleas Court, the briefs and argument of counsel.

Evelyn Pence, individually and as executrix of the estate of her deceased son, (appellant) filed a complaint against the Board of County Commissioners of Hamilton County and Hamilton County, the Sheriff of Hamilton County, the Chief Deputy Sheriff of Hamilton County, the Director of Corrections, the Superintendent of the Community Correctional Institution, the Deputy Superintendent of the Community Correctional Institution, the Chief of Security of that institution, and the Supervisor of the Community Correctional Institution. Appellant also named as defendants William Zuern, John Does, and The Cincinnati Insurance Company. The demand was for compensatory and punitive damages for the wrongful death of Phillip J. Pence (Pence), at the time of his death a corrections officer employed at the Community Correctional Institution (CCI). Pence died as a result of being stabbed by Zuern with an instrument fashioned from a piece of wire.

A default judgment was granted against Zuern, the John Does were dismissed, summary judgment was granted in favor of the other defendants, and this appeal followed.

Appellant assigns four errors, each of which protests, on separate grounds, the granting of the summary judgment. We will treat each assignment as an issue to one assignment of error protesting the granting of summary judgment in favor of appellees (all named defendants except Zuern).

First, appellant challenges the retrospective application of R.C. 4121.80(G), effective August 22, 1986. Pence was mortally wounded on June 9, 1984; the complaint was filed on May 30, 1985. The summary judgment was entered on January 29, 1988, and specifically found that "Amended Substitute Senate Bill No. 307 of the 116th General Assembly is constitutional as applied to the facts of this case." But, on April 13, 1988, the Supreme Court of Ohio held that R.C. 4121.80(G) could not be applied retrospectively because to do so would be in violation of Section 28, Article II of the Ohio Constitution. *Van Fossen* v. *Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 522 N.E.2d 489, paragraph four of the syllabus. Although the decision in *Van Fossen* was handed down after the judgment of the trial court in the case on review, it compels this court to recognize as error the action of the trial court holding the retrospective application of R.C. 4121.80(G) to be constitutionally permissible.

The second basis for the appellant's assignment of error to the granting of summary judgment is an assertion that there are genuine issues of material fact raised by the application of the definition of an intentional tort as contained in *Jones* v. *V.I.P. Development Co.* (1984), 15 Ohio St. 3d 90, 472 N.E.2d 1046. Appellant states this is the applicable law as set forth prior to *Van Fossen, supra.*

We agree that the definition of an intentional tort is contained in *Jones, supra,* as follows:

> An intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.

Jones, supra, paragraph one of the syllabus. The added element in R.C. 4121.80(G) that makes its retrospective application constitutionally infirm is a "deliberate intent" to cause an injury. The law prior to the enactment of R.C. 4121.80(G) was stated in *Jones* as follows:

> Thus, a specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is substantially certain * * * to occur.

Jones, supra at 95, 472 N.E.2d at 1051.

The Supreme Court in *Van Fossen* wrote that they "*now interpret Jones* to require knowledge on the part of the employer as a vital element of the requisite intent." *Van Fossen, supra* at 116, 522 N.E.2d at 504 (emphasis added). The court held further that in order for intent to be found in a claim of an intentional tort committed by an employer against an employee three conditions must be demonstrated: (1) the employer's knowledge of the existence of the danger; (2) the employer's knowledge that if the employee, by virtue of the employment, is subjected to that dangerous condition, then harm to the employee is a substantial certainty, and not just a high risk; and (3) the employer with such knowledge and under such circumstance required the employee to continue the employment tasks.

Although the law as contained in R.C. 4121.80(G) may not, constitutionally, be applied to the case on review, the law announced in *Jones, supra* and interpreted in *Van Fossen, supra*, does not have that constitutional impediment. Thus, we review the evidentiary material submitted for consideration on the motion for summary judgment to determine if there is a genuine issue as to the existence of any of the three conditions, set forth in the *Van Fossen* interpretation of *Jones*, that are required to find the intent necessary to support a claim of intentional tort.

The conditions at CCI as they existed prior to the construction of the Hamilton County Justice Center are documented

in the legal records, both state and federal, in this county. It would serve no purpose to list, once again, all those conditions. It is sufficient to state that the county was under orders to make numerous changes in physical conditions and operations pending the closing of the institution. A jail or penal institution is a place of danger by its very nature and purpose. The following statements from *Van Fossen* may be analogized to the case that we review:

> There are many acts within the business or manufacturing process which involve the existence of dangers, where management fails to take corrective action, institute safety measures, or properly warn the employees of the risks involved. Such conduct may be characterized as gross negligence or wantonness on the part of the employer. However, in view of the overall purposes of our Workers' Compensation Act, such conduct should not be classified as an "intentional tort" and therefore an exception, under *Blankenship* or *Jones*, to the exclusivity of the Act.

Van Fossen, *supra* at 117, 522 N.E.2d at 504 and 506.

Applying the appropriate law to the permissible evidentiary material submitted by the parties, in accordance with Civ. R. 56, we find there is no genuine issue of material fact concerning the knowledge required in order to have a justiciable claim of intentional tort and the trial court did not err in so ruling. See *Mitchell* v. *Lawson Milk Co.* (1988), 40 Ohio St. 3d 190, ____ N.E.2d ____.

The third basis of complaint of the summary judgment in favor of the county commissioners asserts that the duty is on the commissioners to provide a jail meeting the minimum standards for jails in Ohio and that the commissioners assumed responsibility for providing such facility under a contract with the City of Cincinnati. Neither contention in this attack on the summary judgment has merit.

R.C. 307.01(A) requires a board of county commissioners to provide a jail when in the judgment of the board a jail is needed. In such event, it shall be of such style, size, and ex-

pense as the board determines. Any new jails or renovations to existing jails shall be designed and all jails shall be operated in such manner as to comply substantially with the minimum standards promulgated by the department of rehabilitation and correction.

The appellant asserts that the board of commissioners violated these minimum standards in four ways: (1) the jail and the immediate grounds were not kept free of potential health and safety hazards; (2) the grounds, walkways, driveways, and parking areas were not kept in good repair and well lighted to insure safety and adequate perimeter security; (3) all building elements were not structurally sound, clean and in good repair; and (4) sufficient lighting was not provided to insure effective security in all areas. See Appellant's Brief at 20. Of the four specified violations, the first three are without merit; they have no causal relationship to the death of Pence. The fourth has an apparent relevancy until the facts of the case on review are analyzed. Upon analysis, the facts are that Zuern was visible in his cell even in the dim light that was provided. Further, the brightest light possible would not have prevented Zuern from lunging at Pence and stabbing him through the crack in the cell door the second it was opened.

Further, any responsibility for operating CCI "assumed" by the county officials as a result of the contract with the City of Cincinnati could rise no higher than their responsibility independently of the contract. We have previously noted the absence of any causal connection between the asserted violations of the minimum jail standards. There is therefore, as a matter of law, no legal liability on the county commissioners for the tragic death of Pence. On the undisputed material facts, the commissioners were entitled to summary judgment in their favor.

Finally, appellant asserts that her claim for relief pursuant to Section 1983, Title 42, U.S. Code was erroneously terminated by summary judgment in favor of the appellees. We disagree.

A review of the evidentiary material in support of and op-

posed to the summary judgment discloses no genuine issue of material fact relevant to the claim that the appellees, under color of law, deprived the appellant's decedent of federal constitutional or statutory rights.

The conduct of appellees of which appellant complains amounts at most to an allegation of a lack of due care that does not state a claim under Section 1983. See *Davidson* v. *Cannon* (1986), 474 U.S. 344, ____, 106 S. Ct. 668, 671.

The judgment appealed from is affirmed.

HILDEBRANDT, P.J., DOAN and KLUSMEIER, JJ

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

NO. C-880080

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, deceased,
Plaintiff-Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO,

HAMILTON COUNTY, OHIO,

LINCOLN J. STOKES, SHERIFF OF HAMILTON COUNTY, OHIO

VICTOR CARRELLI, CHIEF DEPUTY,

MICHAEL MONTGOMERY, DIRECTOR OF CORRECTIONS,

WILLIAM A. WITHWORTH, SUPERINTENDENT,

STANLEY GROTHAUS, DEPARTMENT SUPERINTENDENT,

ROBERT BROCKMEYER, CHIEF OF SECURITY,

JAMES YORK, SUPERVISOR,

and

THE CINCINNATI INSURANCE COMPANY,
Defendants-Appellees,

and

WILLIAM ZUERN, Et Al.,
Defendants.

JUDGMENT ENTRY
(Filed February 15, 1989)

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton Coiunty, Ohio, be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by her counsel, excepts.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A-8504201

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased

Plaintiff

vs.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO

HAMILTON COUNTY, OHIO
c/o Board of County Commissioners of Hamilton County, Ohio

and

LINCOLN J. STOKES, SHERIFF

and

VICTOR CARRELLI, CHIEF DEPUTY

and

MICHAEL MONTGOMERY, DIRECTOR OF CORRECTIONS

and

WILLIAM A. WITHWORTH, SUPERINTENDENT

and

STANLEY GROTHAUS, DEPARTMENT SUPERINTENDENT

and

ROBERT BROCKMEYER, CHIEF OF SECURITY

and

JAMES YORK, SUPERVISOR
and
WILLIAM ZUERN
and
JOHN DOES
(Real names and addresses unknown)
and
THE CINCINNATI INSURANCE COMPANY
Defendants

JUDGMENT ENTRY GRANTING MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT
(Nurre, J.)

This cause came on to be heard on the Motion of Defendants Board of County Commissioners of Hamilton County, Ohio; Hamilton County, Ohio; Lincoln J. Stokes; Victor Carrelli, Chief Deputy; Michael Montgomery, Director of Corrections; William A. Withworth, Superintendent; Stanley Grothaus, Department Superintendent, Robert Brockmeyer, Chief of Security; and James York, Supervisor; for Summary Judgment pursuant to Rule 56, Ohio Rules of Civil Procedure, and the Court having considered the pleadings in the action, the Memorandum filed by counsel and the Affidavits, Depositions and Interrogatories relied upon therein and filed with the Court, the Court makes the specific finding that the Amended Substitute Senate Bill No. 307 of the 116th General Assembly is constitutional as applied to the facts of this case, and, further having found that there is no genuine issue of fact to be submitted to the Court, and concluded that the above-named Defendants and, therefore, Defendant The Cincinnati Insurance Company are entitled to Judgment as a matter of law, it is hereby

Ordered, that Defendants' Motion for Summary Judgment is in all respects granted, and it is further

Ordered and Adjudged, that Judgment shall be, and is

hereby entered, in Defendants Board of County Commissioners of Hamilton County, Ohio; Hamilton County, Ohio; Lincoln J. Stokes; Victor Carrelli, Chief Deputy; Michael Montgomery, Director of Corrections; William A. Withworth, Superintendent; Stanley Grothaus, Department Superintendent; Robert Brockmeyer, Chief of Security; James York, Supervisor; and The Cincinnati Insurance Company's favor, dismissing this action with costs for Defendants and against Plaintiff.

The Court further certifies and expressly determines herein, that there is no just reason or cause for delay and therefore, hereby enters final Judgment for the above named Defendants only.

_____

Honorable Thomas C. Nurre

Have Seen:
/s/ Robert E. Taylor T-106
Ass't Prosecuting Attorney
Hamilton County, Ohio

/s/ John W. Dressing D-086
Trial Attorney for Plaintiff
CONDIT & DRESSING CO., L.P.A.
305 Dixie Terminal Building
Cincinnati, Ohio 45202
(513) 579-1100

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A-8504201

(Judge Thomas C. Nurre)

EVELYN PENCE, Individually and as Personal Representative and Administratrix of the Estate of Phillip J. Pence, Deceased

Plaintiff

vs.

BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, et al.

Defendants

EXHIBIT "C" TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT — AFFIDAVIT OF KEN KATSARIS

AFFIDAVIT OF KEN KATSARIS

STATE OF FLORIDA)
) SS:
COUNTY OF LEON)

Comes now the Affiant herein, Ken Katsaris, and having been first duly cautioned and sworn, deposes and states, based upon his own personal knowledge, the following:

Affiant is the President of Katsaris and Associates, Criminal Justice Consultants, and has had 20 years of professional experience in the criminal justice field. Affiant's educational

background includes a Bachelors and Masters Degree with a Major in Corrections, is a Doctoral Candidate, has served as a police officer, instructor in police and correction academies, and a professor of Criminal Justice teaching a variety of courses in corrections and law enforcement.

In addition, Affiant was a consultant to the Federal Bureau of Prisons teaching corrections management to staff, served as Sheriff of the Capital of Florida, and administered a jail facility in Florida, served as Assistant to the Director of Corrections for the State of Florida where Affiant assisted in promulgating model rules for the operation of county detention facilities.

Further Affiant states that the Governor of Florida appointed him to the position of Commissioner of the Florida Corrections Standards and Training Council where Affiant participated in setting policy and standards for all correctional offices in Florida. Affiant has been certified as a jail manager by the State Department of Corrections and served as a consultant to the Florida Criminal Justice Standards and Training Commission in the development of a model 320 hour basic training program for all correctional officers. Affiant has testified in every level of court as an expert witness in corrections and published a legal text book entitled EVIDENCE AND PROCEDURE IN THE ADMINISTRATION OF JUSTICE which is used by many colleges. As a result of Affiant's experience and education, Affiant has knowledge of Federal, State and Local standards in the operation of jails and correctional facilities and is competent to testify to the matters stated in this affidavit.

Affiant states that he has been requested by John W. Dressing, Attorney at Law, to review certain materials and evidence developed in the case of *Evelyn Pence, Administratrix* v. *The Board of County Commissioners, et al.*, Case No. A8504201 pending in the Court of Common Pleas, Hamilton County, Ohio, to render opinions with regard to the case.

For purposes of rendering his opinions herein, Affiant has reviewed the following materials provided to him by John W. Dressing:

1. Copies of all pleadings in the case including the Defendants' responses to Plaintiff's interrogatories and requests for production of documents.

2. A copy of the MINIMUM STANDARDS FOR JAILS IN OHIO, FULL SERVICE FACILITY, in effect for the time period of June 1984.

3. Photographs of cell No. 10 and A-Block of the Cincinnati Correctional Institution.

4. The depositions of Schweinfus, Menkhaus, Gibson, York, McCall, Jones, Brockmeyer, Douglas, Cisias, Doughman, Doyle, Fowler, Lambers, Fehr, Prior, Haynes, Burton, and Chief Carrelli.

5. Portions of the file of Phillip Pence, investigation reports by Detective Bennett, correspondence between Sheriff Stokes and Mr. Lehman, and other documents provided to John W. Dressing pursuant to his request for production of documents directed to the Defendants in this case, including an analysis of law enforcement officers feloniously killed, CCI training curriculum and training received by Phillip J. Pence, official crime laboratory report from the Hamilton County Coroner's Office listing the weapon as being a metal rod approximately seven and three-quarters (7¾) inches long, looped on one end and pointed on the other end and dimensions of cell No. 10 in A-Block.

6. Copies of Defendants' Motion for Summary Judgment with its affidavits.

Further Affiant states that established national and state corrections standards, including those promolgated by the American Corrections Standards Association, set forth minimum requirements for the operation of corrections facilities, among which are as follows:

A) Metal detectors at all critical checkpoints in the institution for purposes of security against weapons being

brought into the facility and into critical areas inside. Such detectors are not affected by metal bars within the jail.

B) Material and tools which can be fashioned into weapons or used as weapons must be absolutely controlled to prevent such material from being so used. This would include metal buckets with metal handles and metal fence material.

C) Jail facilities must be equipped with latrines for inmate toilet purposes to be consider adequate.

D) Cells and cell areas must be equipped with lights that produce a clear, well lighted view of the interior of each jail cell for security purposes.

E) Procedures for the operation of a jail facility, including shake down procedures, must be in writing and available to all correction officers.

In addition, other acceptable and routine minimal practices in the operation of jail facilities include:

A) Chain link fencing material, if used at all, should be of a gauge thick enough that it cannot be bent or removed by hand but only by the use of wire cutters.

B) Training in jail procedures should exceed two weeks for each correctional officer.

C) Close circuit T.V. cameras can be used as a security method.

D) Extreme caution should be taken when there is a report of a weapon. All efforts should be concentrated immediately upon locating and removal of the weapon.

Further Affiant states that the facts upon which he bases his opinion herein have been obtained by a review of the materials set forth in this affidavit and materials provided to Affiant by John W. Dressing, and include the following:

That on June 9, 1984, Phillip Pence was assigned to the second shift as a correction officer in the Cincinnati Correctional Institute. His duties included supervision of inmates in the institution in specified areas as assigned and other miscellaneous correction officer's duties including shake down of inmate cells and of the inmates themselves, searching for contraband or weapons.

A first shift correction officer received information that a William Zuern, an "A-Block" maximum security inmate, had a self made knife in his possession. Although this information was received by the correction officer at approximately 2:00 p.m. on June 9, 1984 and the supervisor told of the information at approximately 2:30 p.m. on June 9, 1984, supervision decided to wait until later in the second shift to conduct a search for the weapon. Procedures to be followed at CCI upon report of a weapon and shakedown of cells were not in writing or available to the correction officers in writing at the time.

The lighting available in the CCI generally and in "A-Block" consisted of some flood lights which would light up the common area of "A-Block" but not inside of the cells, and a row of lights outside of and over the top of the cells, including cell no. ten (10), which was William Zuern's cell. These lights were also not adequate to flood the inside of the cells, including cell ten (10), and the natural daylight lighting available during the first shift was lacking on the second shift when supervision of CCI initiated the shake down of Zuern and his cell.

Because of the age and state of repair and renovation of CCI at the time, latrines or toilets were not available for inmates, including the maximum security area of "A-Block" where Zuern was in prison. To provide relief to inmates over night, metal buckets with metal handles were supplied to inmates for toilet purposes. In addition, chain link fence material was used in various inmate access areas throughout the institution at the time. It was common knowledge to correction officers and supervision that the metal bucket handles and metal fence material were removed by inmates and

fashioned into weapons which could be lethal. In spite of this knowledge, the metal buckets with metal handles continued to be issued to prisoners including maximum security prisoners in "A-Block". Nothing was done to remove the fence or to replace it with fence material which could not be removed for such purposes.

Protective defensive materials such as bullet proof vests were not issued to the correction officers at the time and the institution did not have close circuit television system for security monitoring purposes.

Shortly after 10:00 p.m. on June 9, 1984, supervision told correction officer Pence and three other officers to go to cell Block A for purposes of doing a shake down of the cells of two inmates. The supervisors themselves did not go to "A-Block" until Phillip Pence had already been stabbed by inmate Zuern. The correction officers only had flashlights for illumination into the cell area and Zuern was told to come out of the cell. When he moved out of the cell, he immediately lunged at correction officer Pence, stabbed him in the chest with a weapon fashioned either out of the fence material or metal bucket handle, most probably the metal bucket handle.

My opinion, based upon reasonable certainty in the field of corrections and jail facility management, is that the Sheriff's department and the Board of County Commissioners, in their use and operation of the Cincinnati Correctional Institute as a jail facility, fell below acceptable corrections practices in the following respects:

First, the Cincinnati Correctional Institute was grossly inadequate as a jail facility due to its inadequate lighting and plumbing for inmate use. The lack of lighting contributed to an exceedingly dangerous security problem including shakedown of cells. The lack of toilet facilities was aggravated by the actual issuance of metal buckets with metal handles and access to fence material which could be removed from the fence without a wire cutter. National standards for jail facilities call for strict control of tools, which would in my opinion include bucket handles and fence materials, which could be fashioned and used as weapons by inmates.

Further, supplying metal buckets with metal handles which were routinely removed by inmates who were again reissued another metal bucket with metal handle, in view of the complaints and concerns of the correction officers to supervision over a long period of time prior to the date on which Phillip Pence was killed, was totally an unacceptable practice in the management of a jail facility.

Lights are available for jail facilities inside the cells and should have been so installed to provide a better view of a prisoner during a shake down or for other purposes.

There was a failure of supervision to follow acceptable prison standards and practices in the actual search and shake down of the inmate William Zuern. The information concerning the weapon in Zuern's possession, should have been acted upon immediately and with extreme caution and during the daylight hours. It does not appear that there was even more manpower to supervision on the second shift when they actually conducted the shakedown.

Chain link fence material, if accessible to inmates at all, should have been of a gauge which would require a wire cutter to remove. Such material was available at the time of this incident.

Metal detectors were also available at the time of this incident which could be used at check points in the institution for screening against contraband and weapons in the possession of inmates. Such equipment is available which would not be affected by the metal cell doors but would be located at critical points in the cell areas.

Shake down procedures were not in writing and available in writing to the correction officers at the time of this incident. The officers were further given no information by supervision, and also were not even supervised, in the search of Zuern's cell. They were told that generally Zuern and another inmate had a weapon but were not given any supervisory instructions or attention in the shake down of the cell itself.

By permitting Zuern to have a weapon in his possession for approximately eight hours after it was known, fell below ac-

ceptable jail management standards. The weapon could have been used to kill other guards and inmates who may have been unaware of Zuern's possession of the weapon in that eight hour time period. The supervision's failure to immediately respond to this report of a weapon was reckless and below minimum acceptable corrections standards. Protective vests and other defensive materials which were available at the time of this incident, would have provided a measure of safety to Phillip Pence and the other guards in their search and shakedown of Zuern's cell. The training of Phillip Pence for two weeks in-house by the Sheriff's department was inadequate to fully prepare a correction officer for knowledge of jail procedures.

It is Affiant's opinion, that based upon reasonable certainty in the field of corrections and jail management, supervision, including the Sheriff himself and also the Board of County Commissioners, fell below acceptable standards as indicated above and that such failure was substantially certain to cause injury or death to an inmate or correction officer such as that which did occur to correction officer Phillip Pence on June 9, 1984. The deliberate acceptance by Defendants of the conditions outlined herein, directly caused the death of Phillip Pence, in my opinion. The deliberate providing of the material with which to make lethal weapons to inmates further directly caused the death of Phillip Pence.

Further Affiant saith naught.

/s/ KEN KATSARIS

Sworn to before me and subscribed in my presence, this 22nd day of December, 1986.

/s/ NANCY C. BARBER
Notary Public — State of Florida

EXCERPTS FROM DEPOSITION TESTIMONY

A. Respondent Robert J. Brockmeyer

[4] Q. Would you state your name for the record, please.
A. Robert Joseph Brockmeyer.
Q. And what is your occupation?
A. I am a Correction Supervisor III.

* * *

[18] Q. Now, you have had occasion to see weapons that were made by the inmates out at CCI prior to Phil being killed, did you not?
A. I have seen them for thirty-some years.
Q. The questions that I will ask, I will limit myself to — or try to — will be those that were in existence prior to when Phil was killed and up to the date he was killed. I won't ask you questions about the year after he was killed.
What type of weapons did you see out there prior to the time Phil was killed?
A. I have seen shanks.
Q. What were the shanks made of?
A. They were made of various things. They were made of pieces of wire off the fencing, they were made out of a toothbrush, plastic toothbrushes made with razor blades which the officers failed to retrieve. They were made out of glass from the windows.

* * *

B. Witness Jerry Doughman

[3] Q. Would you state your name and your occupation, please?
A. Yes. Jerry Doughman, D-o-u-g-h-m-a-n, deputy sheriff.

* * *

Q. You're a deputy corrections officer?
A. Yes.

* * *

[9] Q. Now, before Philip's death in June of 1984, did you ever have the occasion to see inmate-made weapons at CCI?

A. I saw them have weapons, what we call shanks.

Q. How frequently did you see that?

MR. HURLEY: Objection. What time period are we talking about?

MR. DRESSING: Before Philip was killed.

MR. HURLEY: Narrow it down.

[10] Q. A year before Philip was killed.

A. It depends. You know, some days — at that time, before Phil was killed, I worked in bond and hold, so I never shook anybody down. It wasn't my job, but I saw other officers bring shanks to me or sergeants.

Q. Sergeants?

A. It could be one a day, one a week. It depends on the — what was going on.

Q. And when you said they would bring them to you, is there any reason why they would bring them to you?

A. The deputies?

Q. Yes.

A. The deputies would bring them to me just to give them to the sergeants.

Q. And then would you be the one that would give them to the sergeants?

A. Right.

* * *

Q. Now, what types of weapons were these?

A. Some of them was metal, round metal with a [11] sharp point on the end. The other ones were like a toothbrush with a razor blade melted inside and that was about the only two I ever saw.

* * *

Q. You had occasion to see metal buckets with metal bucket handles out there, did you not?

A. Right.

Q. And did you notice that those bucket handles would disappear from buckets after they were issued to inmates?

[12] A. Yes.

Q. Was there any concern on your part that they were being used to be made into weapons?

A. Yes.

Q. Did you express that concern to anyone in supervision?

A. Yes, I did.

Q. Who did you express that concern to?

A. That was back when I first came there in '79. I worked in maximum security and I just — I don't remember who I talked to. There's only a couple sergeants who worked day shift back then, and I was scared. That was a new job to me and I'm there working with criminals. I never worked with criminals before.

* * *

C. Witness Ronald Doyle

[3] Q. Ron, would you state your name and occupation for the record, please?

A. Ronald R. Doyle, deputy sheriff of Hamilton County.

* * *

[18] Q. Now, how long at the time this happened had you been working in maximum security in A Block there where Zuern was?

A. I can't really say.

Q. Do you know about how long? Was it months?

A. Four months.

[19] Q. Okay. And in that time period were the, what I refer to as night buckets, were they in use in A Block?

A. Yes, sir.

* * *

Q. Are these the metal buckets with the metal handles?

A. Yes, sir.

* * *

Q. Okay. And did you ever see — ever have occasion to

see the handles off, when the buckets just appeared without the handles on them?

[20] A. Constantly.

Q. This is after — this is between the time that you started there in '83 and when Phil was killed?

A. Um-hum.

Q. When you say constantly, can you explain what you meant by constantly?

A. Yes. Second shift — I did over a year in the Main Cell Block before I want to A Block and we had to walk every range every night to confiscate buckets from people who would use one for the bathroom and one for laundry facilities. So we had to check so they only had one and we were always gathering buckets that had no handles.

* * *

[21] Q. And do you know what materials they were made from?

A. I would say some were out of bucket handles, some were out of fences, some were razor blades heated into the end of toothbrushes.

Q. How often would you find the ones made out of bucket handles and metal fences in that time period before Phil was killed?

A. Before Phil was killed? In the two years I was there, I probably found 20 maybe.

Q. Okay.

A. In two years.

Q. You, yourself?

* * *

[22] A. Yes.

Q. What would you do when you would find these shanks?

A. Turn them into the supervisor's office.

Q. And did you ever express any concerns to supervision about these shanks?

A. No. I think they all knew and we all were concerned about them.

Q. And were the buckets continued to be used with metal handles after the shanks were turned in?

A. Yes, sir.

* * *

D. Charles H. Gibson

[4] Q. Supervisor Gibson, would you state your full name and occupation, please.

A. Charles Hugh Gibson, Supervisor I, Hamilton County Sheriff's Department.

* * *

[27] Q. You have seen weapons made down at CCI before [28] Phil was killed; haven't you?

A. Yes, sir.

Q. What kind of weapons would you see made down there?

A. I would say shanks made out of fence or whatever piece of wire they could make a shank out of.

Q. What about bucket handles?

A. They were either parts of the fence or bucket handles. It's hard to tell which is which until you really get into it. They would take razors and melt them into toothbrushes, things of that nature.

Q. But the shank would be made from a bucket handle or a part of a fence?

A. Right.

Q. What part of the fence?

A. Well, the fence is a wire fence, and they could break it off and make a shank out of it the same way.

Q. A chain link fence?

A. Right.

Q. Do they make it out of the actual chain link or do they make it out of the material that secured the chain link to the post?

A. I have seen the whole chain link cut in half. I don't

know where the posts go. I have seen the ties missing. [29] They both, to me, resemble a bucket handle.

Q. Which was used more frequently, the fence material or the bucket handles; if you know?

A. I really can't tell you.

Q. They were both used with some frequency?

A. Oh, yes.

Q. Where did the buckets come from from which they got the bucket handles?

A. That's their night bucket that they use for their bathrooms at night in their cells.

Q. Would these be issued to everyone at CCI or to just certain areas?

A. No, each inmate was issued one.

Q. A-Block where Zuern was?

A. Yes, sir.

Q. Can you describe what these buckets looked like, Officer Gibson?

A. They were like a galvanized bucket, with a metal handle going around the top.

Q. How could the handles be taken off of them?

A. There's just a little tab and you can just bend that or break it off.

Q. It's pretty easy to do that?

A. Not much of a problem.

[30] Q. How did they make weapons out of it?

A. They straightened them and bent them around to fit their hand and then they would sharpen the edge, you know.

Q. How did they sharpen the edge?

A. With a piece of concrete or a piece of metal fence.

Q. How often, back prior to when Phil was killed by Zuern, would weapons be found out there — the shanks I'm referring to now — made from the buckets or the fence material?

A. I can't really tell you. I only worked one shift at that time, and on my shift, maybe four or five a day was turned in.

Q. Four of five shanks per day were turned in?

A. Yeah. You would have inmates making them to turn them in to get a phone call. They'd say, "Hey, I will tell you where a shank is if you will give me a phone call." I would give them a phone call, because they knew I wanted the shank.

Q. At any rate, they would have the actual shanks made, right?

A. Yes.

* * *

E. Witness Robert Haynes

[3] For the record, would you state your full name and also your occupation?

A. Robert Mark Haynes, deputy sheriff.

* * *

[10] Q. Now, how often would you find these weapons made out of these materials that you described?

A. Two, three times a week.

Q. And how many would you find when you would find them?

A. About one each time.

Q. Okay. Would you say anything to anybody when you found these?

A. Just show it to the supervisor and put it on his desk in the office.

Q. Would you have any discussion with him about it?

A. No. Just told him we found one. He'd say, put it on the desk.

Q. Did they ever give you any instructions about what to do with these shanks when you found them?

A. Just — they usually stick them on the desk, in a drawer.

* * *

[11] Q. What about the bucket with a metal handle, what [12] would —

A. A lot of them usually sit on them and crack them or

somebody might take two, use one for a rest room, one to sit on.

Q. Okay. And the — did you ever have the occasion to remove any of the bucket handles yourself?

A. Yes, sir.

Q. And when did you do that?

A. When I was working second shift cell block, we got a shipment in and we took them off once because we had a lot of shanks in the block and we took them off.

Q. How many — were these metal buckets?

A. Yes, sir.

Q. How many handles did you take of? How many buckets, if you know.

A. We had about 25 buckets we took off.

Q. Took the handles off 25 of them?

A. Yes, sir.

Q. Did anybody instruct you to do that?

A. No, sir. We done it on our own.

Q. Did you leave the handles off?

A. No, sir. We was told to put them back on.

Q. Who told you to?

A. S-1 Gibson.

[13] Q. When you say S-1 Gibson, is that Supervisor Gibson?

A. Yes, sir.

Q. And did you — why did you want — why did — first of all, who was with you, if you recall?

A. Deputy Lambers.

Q. Why did you remove the bucket handles?

A. So they wouldn't make shanks out of them.

Q. Did you talk to the supervision about removing them?

A. No, sir.

Q. Did you ever express any concern to supervision about the shanks?

A. Yes, sir.

Q. Could you explain who you did that to?

A. S-1 Gibson, we told him there were a lot of shanks, and he told us to put them back on.

Q. Did he say anything?

A. He said put them back on because of a health hazard.

Q. Health hazard?

A. Yeah. I guess they didn't want to touch the rim of the bucket.

Q. Of a bucket without handles?

[14] A. Right.

Q. And did you ever have any discussions with supervision about using some type of a substitute for metal buckets with handles?

A. No, sir.

* * *

F. Witness David Lambers

[3] Q. State your name and address for the record?

A. David Lambers, 7919 State Road.

Q. And what is your occupation?

A. Corrections officer.

* * *

[6] Q. Now, are you familiar with — were you familiar at the time of the use of metal buckets with metal handles issued to inmates at CCI?

A. Yes.

Q. These were given to them for bathroom purposes, right?

A. Right.

Q. Because they didn't have bathroom facilities in the cell?

A. Right.

Q. And did you ever have the occasion to see weapons made with bucket handle material?

A. I have never seen them make them, but I have seen many of them that have been made.

Q. And how often would you see such weapons?

A. Well, when I worked in the cell block, I would [7] take out about five to ten a night.

* * *

Q. And with regard to the date on which Philip was killed, how many would you say within the six-month time period before Philip was killed?

A. That's really hard to give an exact number, but I would say probably around 30.

* * *

Q. * * * Do you, of your own personal knowledge, know whether they were made of any other material?

A. I know they were made of fence, fencing material, but I have never seen one.

Q. Okay. And what would you do when — you say that you would find these shanks made from bucket handles. What would you do when you would find them?

[8] A. I would collect them and put them on the supervisor's desk.

Q. And was there any policy, written policy, as to what you were — was there any written policy that you were aware of as to what to do with them when you found them?

A. Not that I know of.

Q. And would you have any conversation with your supervisors about it at any time when you found those?

A. I just told him what I got out of the block that night. Nothing really formal.

Q. And what would they tell you, if anything, about it?

A. They would just say, good job. That's basically it.

* * *

[9] Q. Did you ever have the occasion yourself to do anything with the metal buckets and the handles?

A. Well, one time myself and Deputy Haynes were taking the handles off and Supervisor Gibson came back into the block and he told us not to take them off.

Q. How many bucket handles did you take off?

A. We had taken about 20 off.

Q. And why were you taking bucket handles off?

A. Because they were a known weapon.

Q. How long had that occurred before Philip was killed?

A. Approximately a year, year-and-a-half.

* * *

G. Witness Rufus McCall

[4] Q. Would you state your name and occupation, please.

A. Rufus McCall. My occupation is Corrections Officer, Hamilton County Sheriff's Department.

* * *

[14] Q. Were there ever any discussions among the supervisors or among the guards about putting some other material in the chain link fence there?

A. There was always a discussion. Everybody was concerned. Usually, the concern would come from the newer guys that would come in, and as you were there longer, guys sort of got relaxed and they didn't worry about it or think about it as much. But a new guy would come in and he'd be a little concerned. He'd think this might be dangerous, especially after they had been on a shakedown and had found weapons. But then after you were there awhile you just kind of didn't think about it very much.

Q. What would the new people be concerned about? Who would they express their concern to?

A. Each other, the supervisors; just anybody that would listen.

Q. What would the supervisors tell the individuals?

MR. HURLEY: Objection. Let's get to a specific conversation —

Q. Do you recall a specific conversation?

A. Not really. I can recall, you know, when I started there and my concerns when I first went there, but as far as, you know, do I remember a conversation that took place on a certain day between two individuals, I don't recall that.

[15] Q. But you do remember that new deputy corrections officers would express concern?

A. Yes. Very often, the new people would be concerned

about safety itself because they would start and they were new and there's a lot of prisoners and they are thinking about their safety and they are being a little bit more cautious. But then after you are there for a year or two, or whatever, you get a little more relaxed.

Q. And you say that when you first started there you were concerned about the fence materials?

A. Yes, I was concerned when I first started. I didn't start there. I started downtown, but when I became a supervisor and transferred to CCI, I had more contact with it. I was more concerned about the — one of my concerns was: Was this fence strong enough to keep someone from going over? The other concern was that it was very easy to break stuff off of there and use it as weapons.

* * *

[19] Q. That fence material that we see around that Exhibit No. 8, that's the type of material you're talking about that they make weapons from, right?

A. Yes.

Q. Did they ever replace that fence with new fence?

A. This fence?

Q. Any of the fences in the ranges.

A. No. The only thing I remember them doing, as far as altering the fences on the end of the ranges, at one time there was no fencing there and we had a few inmates diving off the ranges. So they enclosed that also. But as far as replacing the fence, to my recollection they never replaced it.

* * *

[24] Q. Was an inspection made by yourself, as a supervisor, or other individuals there, to look for buckets that didn't have handles on them?

A. Yes. You saw buckets without handles, but usually what would happen if you questioned an inmate about what happened to the handle of the bucket, he'd say it broke or he threw it in the garbage can or, "I need a new bucket." Some

of the buckets were old and the handles would just come off easily so——

Q. Pardon me?

A. I was just saying that some were old and the handles did just come off.

Q. Would there ever be a shakedown when it would be noticed that the handles were missing from buckets, to see if weapons were made from them?

Q. Sure. You'd have a shakedown and maybe find in a guy's cell he wouldn't have a handle on a bucket. But you didn't consider it a big deal if it didn't have. One, a lot of times they break it off. Two, some of the buckets were old and the handles just came off, and three, some guys would tell you that they took it off because they didn't like the handles on the buckets. They would rather carry it without the handles.

[25] Q. When it was noticed that a bucket didn't have a handle, would it be replaced with one with handles?

A. I always instructed my people that worked with me to replace the bucket if it didn't have a handle on it.

Q. Did any of the people that worked for you express concerns about buckets that didn't have handles on them?

A. Yes, guys expressed a concern. But, you know, like I said, one day guys are really concerned about it and another day they're not. If you go and have a shakedown and you find five or six shanks, you know, everybody is concerned. If you go a week without finding anything, people forget about the concern.

* * *

[26] Q. Okay. When shanks would be found, what would be done with the shanks?

A. We would take it, take it to the office, put it in a pile, and we would usually get rid of them, take them out to the dumpster in the back and throw them in there. And, you know, maybe at the end of the week, or whenever they collected the garbage, they would take the dumpsters out and get rid of them.

Q. In the course of a week, before Phil was killed, how many shanks would be found?

MR. HURLEY: Objection. You can answer.

A. I really couldn't say how many exactly. It varied. [27] One week you may find one and one week you may find none. And some weeks you may find a bunch of them.

Q. What do you mean by a bunch of them?

A. Five or six.

Q. In a week?

A. It was possible. It wasn't an everyday thing that you would go in and find five or six. Most of the time they were hidden well or the guys didn't want to keep them on them. They wanted to keep them somewhere where they'd have easy access to them. Because if they got caught with them, we would charge the person.

Q. You say they would accumulate a pile and then toss them out. What do you mean by a pile?

A. You may get two or three or you might get 10 or 12 of them and then you take them out and throw them away, or you might even get — if you have just one, you have somebody take it out to the container in the back and get rid of it.

* * *

H. Witness Kenneth Schweinefus

[4] Q. Officer Schweinefus, would you state your name for the record, please.

A. Kenneth Wayne Schweinefus.

Q. And your occupation.

A. Corrections Officer II.

* * *

[16] Q. What kind of a weapon would that have been?

A. Well, a shank is — in just a few words — is a bucket handle sharpened at the end, sometimes with the end bent.

Q. So that is what you took that to mean?

A. Yes.

Q. Did you see the weapon used on Phil Pence?

A. I didn't see the actual weapon.

Q. Did you have to go to court to testify about that?

A. Yes, I did, sir.

Q. Did you have any conversations with Phil Pence on that day?

A. No, I did not.

Q. Had you ever seen shanks in the institution there before that occasion?

A. Yes, I have.

Q. How frequently would you see them?

A. Very frequently.

Q. Very frequently?

A. Yes.

Q. Could you be more specific?

A. Meaning, that I would say every other day someone would find a shank somewhere in the Main Cell area and also [17] A-Block.

Q. And when you say every other day, would that be one shank or more or what?

A. One or more.

Q. And did you know where these shanks came from?

A. Yes, I did.

Q. Where?

A. They either came from the bucket handles or they came from the fence, torn away from the fence and broken off and sharpened.

Q. You were in A-Block — Were you regularly assigned to A-Block?

A. Yes, I was at that time.

Q. Were you ever instructed by supervision to inspect the fence material or the buckets themselves, to see whether there were missing parts?

A. That was routine every day, more or less.

Q. How did you go about that?

A. You walk the range, check the fence line and you look inside the cell and you glance around for anything out of place or for anything unusual.

Q. If you noticed that a prisoner's bucket didn't have a handle on it, would you do anything specific in response to that?

[18] A. You might take an extra look at that cell to make sure the handle wasn't in there.

Q. Would you quiz the prisoners about it?

A. Sometimes, yes.

Q. When you say you might take an extra look at the cell, would that mean going in and searching underneath the mattress and other hidden parts?

A. Right.

Q. Was that done all the time or just sometimes?

A. It was more or less periodic, I guess you could say. If you knew an inmate was a particular problem, then you might walk in and turn the mattress up or look under a few books or what ever you have in there.

Q. Were there any specific instructions by supervision that when you noticed a bucket missing you should check it out?

A. Not to my knowledge.

Q. How long had the buckets been in use out there when this happened?

A. From the time I started in 1981.

Q. Did you ever complain about the buckets to supervisors?

A. Verbally, yes; never written down.

Q. Who did you complain to about it?

[19] A. I guess I had never complained to a supervisor, just general talk among one another — with the supervisor.

Q. What was your complaint?

A. The fact that they shouldn't have been in there.

Q. Did any of the Corrections Officers make the same complaint?

A. Yes, they did.

* * *

Q. Did supervision do anything in response to that?

A. No, sir, not to my knowledge.

* * *